SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

179

No. 179

LILLIAN A. WEADE, FREDERICK M. WEADE AND ROBERTA L. STINEMEYER,

Petitioners,

vs.

DICHMANN, WRIGHT & PUGH, INCORPORATED,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Lillian A. Weade, Frederick M. Weade and Roberta L. Stinemeyer, respectfully petition this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit (R. 234) is reported at 167 Fed. 2d. —.

Basis for Jurisdiction

The judgment of the Circuit Court of Appeals was entered May 13, 1948 (R. 239). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A. 240(a)), as amended by the Act of February 13, 1925; under Revised Rules of the Supreme Court of the United States, Rule 38, paragraph 5, sub (b), in that "A Circuit Court of Appeals * * * has decided an important question of federal law which has not been, but should be, settled by this court or has decided a federal question in a way probably in conflict with applicable decisions of this court," and further, because of the great importance of the question involved.

Questions Presented

1. Is it necessary to find the general agent owner *pro hac vice* in possession and control of the vessel owned by the United States to hold it liable to passengers of the vessel injured by the negligence of said general agent?

2. Did the Suits in Admiralty Act and the general agency agreement between the general agent and the United States give the respondent (general agent), immunity from suits brought by passengers for injuries caused by the negligence of the general agent?

3. Does the failure of the general agent in the management and conduct of the business of a United States vessel to provide adequately for the protection of passengers and to use due care in the procurement of crew members resulting in injury to passengers of said vessel, give rise to a common law action by the passengers against the general agent, or is the exclusive remedy of the passenger a suit against the United States under the Suits in Admiralty Act?

Statement of the Matter Involved

These cases involve actions by Lillian A. Weade and Frederick M. Weade, her husband, and Roberta L. Stinemeyer for personal injuries suffered by Mrs. Weade and Mrs. Stinemeyer while passengers aboard the S. S. Meteor, a ship owned by the United States, against Dichmann, Wright & Pugh, Inc., a shipping company, operating the vessel under a standard general agency agreement between the United States acting by and through the War Shipping Administration and the respondent, Dichmann, Wright & Pugh, Inc. The actions are based upon the negligence of the respondent, Dichmann, Wright & Pugh, Inc., in the management and conduct of the business of the said vessel and in its failing to perform duties owed by it to the petitioners as passengers (R. 1, 7).

In 1943 the War Shipping Administration entered into a contract with the respondent, commonly known as a general agency agreement (R. 102 *et seq.*). The respondent operated approximately 20 cargo vessels (R. 73) but did not enter upon passenger service under this agreement until June 1945, when Part II of the Service Agreement was executed by the parties and the respondent undertook the operation and management of two passenger vessels, the S. S. Meteor and the S. S. District of Columbia (R. 73, 120-122). On this operation the respondent took over the staff of the previous operator and owner of the S. S. District of Columbia, the Norfolk & Washington Steamboat Company, with the exception of its three top executive officers, and proceeded to operate both vessels in the Norfolk and Washington passenger service and "ran that line and directed its operation both in a general way and responsible for the details" (R. 212).

The general agent selected and appointed a master for the Meteor from among ship captains known to them, and

procured and selected a crew to operate the vessel in the usual manner customary for the manning of such vessels (R. 73-4, 76). It made no investigation of persons selected for the crew (R. 75, 77-78, 213-214). Its manner of selection of the crew members for this passenger vessel was the same as the method used for any other vessel operated by it in the cargo trade (R. 213-214). The record shows that as to the cook, Barnes, the respondent did not merely procure the man to be hired by the master but had actually employed him (R. 133, 136 (Int. 2); 179; 91-2). Further, the respondent deemed itself authorized not only to hire but to discharge employees aboard the vessel (R. 213, 214). The record discloses no rules, regulations or directions received by the general agent from the War Shipping Administration relative to the operation of this vessel in the passenger trade. Testimony does show that the captain and crew looked to the respondent for orders and instructions (R. 48, 54, 59, 62, 222).

The general agent handled all matters relating to the booking of passengers and the assignment of staterooms and offered to the public passage for hire between Norfolk and Washington on the S. S. Meteor (R. 121, 134, 136).

On the night of August 3, 1945, Mrs. Weade and Mrs. Stinemeyer boarded the Meteor at Old Point Comfort, Virginia and they thereupon became fare paying passengers and were assigned a stateroom (R. 174). They retired at approximately 11:00 p. m., Mrs. Weade taking the lower berth and Mrs. Stinemeyer, the upper (R. 181, 202). Between 3:00 a. m. and 3:30 a. m. Barnes, employed in the steward's department, entered the staterpom, assaulted and raped Mrs. Weade, and caused fright and shock to Mrs. Stinemeyer, who by fear and compulsion was forced to remain in the stateroom and witness the violation of Mrs. Weade (R. 203-5, 185-190).

Although the Coast Guard regulations required a suitable number of watchmen on *each* deck (R. 56, 217-18) and although the vessel in question had *three* decks (R. 228), at the time the events were occurring there was only *one watchman* on duty, one Charles Adkins, and he was resting on a lounge in the interior of the vessel (R. 24, 25, 26).

Upon trial before a jury the evidence showed among other things that:

1. Jack Lester Barnes, a cook aboard the S. S. Meteor, had a criminal record (R. 168-171).

2. The respondent in procuring Barnes as a member of the crew of the S. S. Meteor made no investigation into his past criminal record or his habits and traits of character (R. 77-78).

3. That the respondent procured and retained in service an inexperienced, incapable watchman who performed the duties of "fixer" of all slot machines on board and performed his duties as watchman by hourly tours and interim rest on the studio couch (R. 217, 221, 224-26).

4. The general agent procured and retained in service the watchman Adkins knowing he held two positions on board and drew compensation from an outside source, as well as from the respondent, in violation of Coast Guard rules and regulations (R. 217, 218, 220-21).

5. The general agent failed to procure and make available to the master for engagement by him the number of watchmen required by the Coast Guard rules and regulations for a vessel of the type of the S. S. Meteor (R. 218, 54-57, 225.)

6. The general agent failed in its duty to see that its "company rules" with regard to drinking by crew members aboard the vessel was enforced (R. 58-59).

The jury returned verdicts for Mrs. Weade in the sum of $50,000; Mr. Weade, $1,000, and Mrs. Stinemeyer, $5,000 and judgments were entered upon the verdicts (R. 32). On May 13, 1948, upon the respondent's appeal, the United States Court of Appeals for the Fourth Circuit reversed the judgment of the lower court, directing judgment for the respondent herein (R. 239), having found that the respondent herein as general agent was not owner of the vessel *pro hac vice* in custody and control of the vessel, and, therefore, for that reason not liable to the plaintiffs for any negligence resulting in their injuries (R. 234).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court and directing that judgments be entered exonerating the respondent Dichmann, Wright & Pugh, Inc. of liability.

2. In governing its decision by application of the decision of this Court in *Caldorola* v. *Eckert, et al.*, 332 U. S. 155, and in failing to consider and apply the doctrine laid down by this Court in the decision of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575.

Reasons for Granting the Writ

This case presents for the first time in this Court the question of the liability of a general agent managing and conducting the business of a United States owned vessel under a general agency agreement to paid passengers of such a vessel for injuries suffered by reason of the negligence of the general agent. This Court has already considered under particular factual situations the liability of general agents operating United States vessels under general agency agreements to a visitor aboard the vessel in

Brady v. *Roosevelt S. S. Co.*, 317 U. S. 575; to a seaman, in *Hust* v. *Moore-McCormick Lines, Inc.*, 328 U. S. 707; and, to a longshoreman, in *Caldorola* v. *Eckert, et al.*, 332 U. S. 155.

In the *Brady* and *Caldorola* cases injuries were caused by defective and dangerous conditions existing aboard the vessel, whereas in the *Hust* case the injuries were caused by negligence of a fellow servant. This provides a further and patent distinction between the cases heretofore decided and the instant case in that here a passenger is injured by the negligence of a general agent itself in failing to provide proper safeguards for the protection of passengers and its failure to use due care in the selection of members of the crew. Thus, here no questions of the application of the doctrine of *respondeat superior*, as in the *Hust* case, or any question of possession and control of premises imposing liability for their dangerous condition, as in the *Caldorola* case, are involved. Accordingly, the Circuit Court of Appeals for the Fourth Circuit has in this case decided an important question of federal law which has not been, but should be, settled by this Court.

The question of tort liability of the general agent to the passengers aboard a United States vessel arising out of the failure of the general agent to perform its duties so as to adequately protect passengers and to use the care prerequisite for the security and safety of passengers in their selection of employees, insofar as it is entangled with the construction of the general agency contract is a matter of federal concern; *Caldorola* v. *Eckert, et al., supra.* In addition, since the injury occurred to the petitioners on the maritime waters of the United States on a vessel owned by the United States, it might be characterized as a maritime tort and as such founded upon federal law. True, Section 9 of the Judiciary Act of 1789 saved "to suitors in all cases

the right of a common law remedy", nevertheless, the substantive right itself is a matter of federal law. *Waring* v. *Clarke*, 5 How, 441, 460-61; *The Moses Taylor*, 4 Wall. 411, 431; *Chelentis* v. *Luckenback S. S. Co.*, 247 U. S. 372, 384; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 259.

The question presented is an important one. In view of our current and past history there have been many times of emergency, war, industrial dislocation and labor disputes which have made it necessary that the government take over and operate the shipping industry. The government has found it necessary on several occasions to take over the operations of shipping lines, using the equipment of private companies, as well as their managerial staffs and complete personnel. In view of this history and many legislative enactments of Congress authorizing and directing government control and operation of shipping, it becomes almost a certainty, that in some way or other, in our nation's future, parts or all of our shipping industry may pass from time to time to government control. Upon the various occasions in the past when emergency conditions necessitated public control of shipping, the methods used to accomplish that end have not been greatly dissimilar one from the other; and, the future will see the United States operating its own vessels and the vessels of private owners in the public interest in the same manner as the S. S. Meteor was operated by the United States through the War Shipping Administration as in this case, with the aid of private shipping companies such as the respondent acting as general agents. Therefore, the responsibility of such private shipping companies operating United States vessels under general agency agreements, to passengers carried on those vessels for injuries, should be determined and settled by the decision of this Court since it is a question of great public importance.

I

It is not necessary to find the general agent owner pro hac vice in possession and control of the vessel owned by the United States to hold it liable to passengers injured by the negligence of the general agent.

The Circuit Court of Appeals for the Fourth Circuit has decided this case in conflict with the applicable decisions of this Court. It has applied the rule of the *Caldorola* case to the questions raised here. The precise question there involved was whether the general agency contract created a relationship between the shipping company and business invitees aboard the vessel, which under New York law would impose liability for injury caused by dangerous conditions on board. The court found that there was not that possession and control of the vessel in the shipping company such as would under New York law make the shipping company liable to a longshoreman for injury caused by a defective boom. The instant case raises the question of liability of the general agent to passengers for injuries suffered by them caused by the negligence of the general agent itself. Despite that very clear distinction between the *Caldorola* case and this case, the Circuit Court of Appeals said: "We think that the *Caldorola* case is decisive here." The decision of this Court in the *Brady* case, which should be controling since it decided the precise and single point that the general agent may be liable for its own torts, was completely ignored and not applied by the Circuit Court of Appeals. That the Circuit Court of Appeals was confused as to the issues and the applicability of the *Caldorola* decision appears from the fact that the Court quotes from Mr. Justice Douglas' dissent in the *Caldorola* case and goes on to state: "but we are not at liberty to decide what merit therein lies. The Supreme Court in the majority opinion

has spoken and we must follow." Nowhere in the opinion of the Circuit Court of Appeals is the *Brady* case cited or referred to and we must conclude that the court ignored the applicability of that decision to the issues raised here despite the fact that the *Brady* case decides the very point on which the theory of the petitioners' case has been based.

The neglect with which the general agent is charged is not such as would require as a prerequisite to liability that the general agent be found owner *pro hac vice* in possession and control of the vessel. The neglect charged and proven at the trial occurred and is quite independent of any control or possession by the agent while the vessel was envoyage. The general agent was engaged by the United States to manage and conduct the business of the vessels assigned to it because it was an experienced shipping company fully cognizant of all business and operational functions of the shipping business and experienced in the matters relating to the operation of cargo and passenger lines. The government in its widespread and diverse wartime activities, as a part of which it operated and controlled almost the entire merchant marine of the United States which itself was the largest in the history of the world, could not in a general way much less as to details control and manage individual lines, secure masters and crews for single vessels, arrange for passenger travel, and do all things required for the accommodation, security and protection of passengers. That is the very reason it secured and contracted with private shipping companies to act as general agent. As a practical matter the general agent did, under the General Agency Agreement, procure a master and the crew, equipped and supplied the vessel and arranged for the transportation of passengers; and, further, in actual practice it alone inquired, to the extent that any inquiry was made, into the qualifications of crew members, it alone discharged crewmen, issued orders and directives for disciplining the crew and the

master served the general agent and looked to the company for directions. The respondent here, an experienced shipping company, knew the duties and obligations owed by a carrier to its passengers and was fully aware that its experience and knowledge was the reason it was called upon to act as the government's general agent. With knowledge of all that was required of carriers with regard to their duties to passengers, this general agent, charged with the management and conduct of the business of the vessel and with arrangements for the transportation of passengers, with the duty to equip and supply the vessel, and with the duty to procure master and crew needed to fill the complement of the vessel, miserably failed to meet its responsibilities. It is respectfully submitted that its negligence in this regard, irrespective of its position of owner *pro hac vice* in possession and control of the vessel, imposed upon it liability to passengers.

IA

In any event, the record in the instant case shows such possession and control of the vessel in the general agent upon which liability to these petitioners may be founded.

It has been contended that the general agency agreement in the instant case was intended to and did make certain that the operation of vessels under it was the operation of the United States and not the general agent, that the master as agent of the United States, owner of the vessel, was in complete possession and control and that the crewmen were the employees of the United States hired by the master. The court below, accepting this interpretation of the language of the general agency agreement and the announced intention of the parties to it, particularly as expressed by counsel in briefs and arguments, together with confusion injected into the case by counsel for the United States as *amicus curiae* in its discussion of berth agency agree-

ments which are in no wise involved in this matter, held that "Dichmann is liable to the plaintiffs here if, but only if, we can read 'the contract so as to find the agents to be owners *pro hac vice* in possession and control of the vessel' ", and then proceeded to conclude a want of that prerequisite to absolve the respondent from any obligation to the passengers injured aboard the vessel. So that by virtue of the contract between the principal and agent the rights of these petitioners are denied.

In *Hust* v. *Moore-McCormick Lines, Inc., supra,* Mr. Justice Douglas in his concurring opinion at page 736, said:

> "If the parties to a contract could by the choice of a label determine these questions of responsibility to third persons the problem would be simple. But the conventions of the parties do not determine in the eyes of the law the rights of third persons. Brady *v.* Roosevelt S. S. Co. 317 U. S. 575, 583 • • •."

It becomes pertinent then to inquire into what the parties did under the contract. If there is substantial control in connection with the management or *operation* of a vessel or its business, the agent as "*operator*" must be deemed owner *pro hac vice.* In *Quinn* v. *Southgate Nelson Corp.,* 121 Fed. 2d 190, it was held necessary to show only partial control by the agent to develop that the agent was actually "*operating*" the line.

In the instant case the respondent's president testified that they "ran the line and directed its *operation,* both in a general way and responsible for the details" (R. 212). The president stated that the respondent was "general steamship agents, *operators*" (R. 72); that they "*operated* under Coast Guard regulations" (R. 217) "and they were paid for *operating* the line" (R. 84). As far as Barnes was concerned he was employed by Mills E. Bell, an employee of the

respondent, not the United States (R. 133, 136 (Int. 2) 179, 91-92); that the respondent and its officers believed themselves authorized to discharge employees of the vessel (R. 213-14). The respondent's president stated: "We appointed Captain Hudgins, whom we knew"; (R. 73-74) and the master of the ship looked to the company for rules and regulations and was subservient to the company (R. 48, 54, 59, 62) and Adkins, a member of the crew, looked to the respondent for instructions (R. 222). Although the general agency agreement provided that the general agent "manage and conduct the business for the United States in accordance with such directions, orders or regulations as the latter has prescribed or from time to time may prescribe", the record discloses no directions, orders or regulations given by the United States to the respondent, except some direction with regard to the handling of money and accounts. This condition is very unlike that found in the *Caldorola* case, where the record contained voluminous orders, directions and regulations which did minimize the control exercised by the general agent.

The fact that the general agency agreement provided that the master should have full control over the vessel and its crew added nothing to his responsibilities imposed by law; *The Oregon*, 158 U. S. 186. Therefore, the contention that the master had full authority and control over the vessel and its crew does not justify the conclusion that the general agent, that actually operated the vessel and exercised so much control, was not in the position of owner *pro hac vice* in possession and control of the vessel.

That the general agent under the general agency agreement might be subject to liabilities and claims growing out of whatever degree of custody and control and possession of the vessel it had and its manner of performance of its agreements insofar as they affected third persons, was con-

sidered by the parties to the general agency agreement, is demonstrative in those sections of the agreement dealing with indemnity and insurance (R. 110, 115).

It is, accordingly, submitted that the record clearly discloses sufficient bases for holding the general agent owner *pro hac vice* in possession and control of the vessel insofar as passengers are concerned.

II

The general agent does not have immunity from suits by passengers for injuries caused by its own negligence.

The ruling of this Court in the case of *Brady v. Roosevelt S. S. Co., supra,* was to the effect that the Suits in Admiralty Act did not make private operators, such as the general agent therein, non-sueable for their torts. This ruling, however, would be clearly decisive of the question presented in the present case were it not for the fact that the general agency contract in the *Brady* case is slightly different than the general agency contract involved in the present case. The essential differences are that in the latter contract an attempt was made by a change in the wording of Article I and Article III(a) to make certain that the operation of the ship appears to be government operation, and the master and crew appear to be the agents and employees of the United States Government. While the general agency contract in the *Hust* case was somewhat similar to the contract in the present case, the *Hust* case determined the rights of a seaman against the general agent under the Jones Act. It is significant to point out, however, that in none of the cases heretofore reviewed by the Supreme Court has the question arisen as to the interpretation of a general agency contract under which the general agent has been engaged in the business of operating passenger vessels.

If the interpretation placed upon the *Caldorola* case by the Fourth Circuit Court of Appeals is determinative of the rights of passengers, all claims of passengers against general agents will be barred. By the strict application of the possession and control doctrine the general agent is given complete and absolute immunity from all claims arising from injuries to passengers. It is submitted that the decisions of this Court do not give such an immunity. In fact, the *Brady* case specifically stated that the suits in Admiralty Act did not free the agent from liability for his own torts. The *Caldorola* case was determined on the narrow issue as to whether under the stated facts Caldorola was entitled to recover against the general agent. This Court has stated in the *Brady* case: "moreover, if petitioner had a cause of action against the respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained"; citing *Guaranty Trust Co. & S. D. Co.* v. *Green Cove Springs & M. R. Co.*, 139 U. S. 137. The rights of principals and agent *inter se* are not the measure of the rights of third persons against either of them for their torts. Regardless of the merit of the statement of Mr. Justice Douglas as applied to the *Caldorola* case, "whatever the consequence is in other situations, it is shocking to find private operators getting immunity in this manner from their traditional liability for tort claims," that statement is most pertinent here. This court has not yet held that general agents are entitled to the broad immunity given to them by the decision of the Fourth Circuit Court of Appeals. The agent was negligent, its negligence was conclusively established; it is not exonerated by statute, and, therefore, it should not be granted immunity by judicial decree.

III

The Suits in Admiralty Act does not provide the exclusive remedy for passengers aboard United States vessels injured through the negligence of a general agent.

The error of the Circuit Court of Appeals in unequivocally applying the doctrine of the *Caldorola* case indicates a confusion of just what negligence is charged against the respondent. There is no attempt here to charge the respondent with the negligence of a crew member under the doctrine of *respondeat superior* as in the *Hust* case. There is no attempt here to impose liability upon the general agent upon any theory of defective or dangerous conditions in the physical premises of the vessel such as would impose liability upon one in the position of owner or one in immediate possession and control of the premises. The simple issue involved in the case was whether the general agent owed a duty to passengers and whether it was negligent in the fulfillment of that duty, which neglect proximately caused the injury to the petitioners.

If the general agent bound itself by contract exclusively to manage and conduct the business of the vessel, arranged for the transportation of passengers, equip, victual, supply and maintain the vessel, it created the risk that its failure to perform its obligation might cause injury to innocent third parties, particularly passengers. Consequently, the general agent is under the duty to such parties to save them harmless from that risk. For the negligent breach of that duty the law imposes liability on the agent. *Dahms* v. *General Elevator Co.*, 214 Cal. 733; *Van Winkle* v. *American Steam Boiler Ins. Co.*, 52 N. J. L. 240; *Hudson* v. *Moonier*, 102 Fed. (2d) 96, 99, C. C. A. 8; *Murray* v. *Cowherd*, 148 Ky. 591; Restatement of Torts, Sections 404 and 395. See

also *Osborne* v. *Morgan*, 130 Mass. 102, 2 Am. Jur., Agency, Section 333, p. 262.

It has been long established that the right of a ship owner to limit its liability is dependent upon his want of complicity in the acts causing the disaster and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service. *McGill* v. *Michigan S. S. Co.*, (C. C. A. 9, 1906) 144 Fed. 788; *The Elton* (C. C. A. 3, 1906) 131 Fed. 562, 142 Fed. 367; *The Cygnet* (C. C. A. 1, 1903) 126 Fed. 742.

Where competent, careful and safe employees are required to accomplish an undertaking it is negligence on the part of the person procuring and selecting them not to procure and select such persons having such qualifications, which negligence renders them liable to persons for injuries occasioned thereby. *Shoemaker* v. *Kingsbury*, 79 U. S. 369; *Holladay* v. *Kennard*, 79 U. S. 254; *Nieto* v. *Clark*, Fed. Case #10262 (C. C. Mass.); *Gallena* v. *Hot Springs R. Co.*, 13 Fed. 116.

In the *Brady* case the court stated that the sole question involved was whether the Suits in Admiralty Act made private operators, such as the respondent, non-sueable for their torts. The court held that the rule handed down in the *United States Shipping Board Emergency Fleet Corp.* v. *Lustgarten*, 280 U. S. 320, was untenable so far as it would prevent a private operator from being sued for his torts. As the *Brady* case has not been overruled by this court, its holding that the remedy of an injured third person aboard a United States vessel is not confined to the Suits in Admiralty Act is controlling.

Conclusion

The question presented is one of grave importance to the public generally; the decision below in conflict with decisions of this Court adopts a rule which deprives passengers aboard United States vessels of common law rights, and gives immunity to private operators, which immunity is neither sanctioned by statute nor decisions of this Court. Only this Court can finally resolve the confusion attending the question. We therefore respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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